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A CAUTIONARY TALE ON ARBITRAL AUTHORITY:  
JUDGES, ARBITRATORS AND THE *STOLT-NIELSEN* DECISION

By  
William W. Park\*

I. PARCEL TANKERS AND ANTI-TRUST

Few matters prove as slippery as the allocation of tasks between judges and arbitrators in commercial disputes. A choice to arbitrate implicates waiver of access to otherwise competent courts in favor of adjudication which is both private and binding. Respect for this bargain means that judges should not normally disturb an arbitrator's substantive conclusions.

Unlike the merits of a dispute itself, however, an arbitrator's jurisdiction must necessarily fall within the province of judicial review. No reason exists for a court to defer to arbitrators on matters never given to them for decision. Courts understandably hesitate to enforce decisions by arbitrators who have clearly ignored the contours of their mandate.

This sensible delineation of tasks inheres in most modern arbitration statutes, including the Federal Arbitration Act ("FAA"), which empowers courts to vacate awards "where the arbitrators exceeded their powers."<sup>1</sup> Award annulment would not be appropriate, however, simply because a judge disagrees with the award on questions of law or fact submitted to arbitration.<sup>2</sup>

This division of labor has been put into question by the recent decision of the United States Supreme Court in *Stolt-Nielsen v. AnimalFeeds*.<sup>3</sup> The case arose from actions for price-fixing against several ship owners by customers who had

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<sup>1</sup> 9 U.S.C. §10(a)(4) (1925).

<sup>2</sup> With respect to foreign awards, Article V of the 1958 New York Arbitration Convention applies a similar principle, denying recognition if the arbitration agreement was "not valid" or the award contains decisions "beyond the scope of the submission to arbitration."

<sup>3</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

chartered vessels commonly known as “Parcel Tankers” to transport liquids such as food oils and chemicals. The customers alleged that the owners had engaged in anti-competitive practices.<sup>4</sup> All of the charter parties included similar arbitration clauses.

The customers requested a single consolidated proceeding to address their combined claims, known as “class action arbitration” borrowing a term from American court procedures.<sup>5</sup> They may have felt that such proceedings would permit them to muster greater legal firepower and to reduce legal costs to the level of making the litigation worthwhile.<sup>6</sup> Not surprisingly, the ship owners preferred a divide and conquer litigation strategy.

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<sup>4</sup> In a companion criminal case, *Stolt-Nielsen* itself had admitted to engaging in an illegal cartel. In exchange, the Department of Justice granted amnesty. In 2003, however, the Department of Justice attempted to renegotiate the deal, claiming *Stolt-Nielsen* had failed to take corrective action. In 2007, the Eastern District of Pennsylvania held that the Department of Justice could not withdraw its bargain once *Stolt-Nielsen* executives had relinquished their Fifth Amendment right against self-incrimination. *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp. 2d 586 (E.D. Pa. 2007).

<sup>5</sup> Although slightly misleading in the context of arbitration, the term “class action arbitration” is now widely used to describe consolidated arbitration proceedings. In a true class action, under Rule 23 of the Federal Rules of Civil Procedure, a small number of plaintiffs is “certified” to represent a larger class of plaintiffs who have substantially similar claims, whether they know it or not. By contrast, in *Stolt-Nielsen* there was no attempt to join parties who had not signed arbitration agreements with each other. In essence, the term is used as another way to describe consolidation of related claims and counterclaims which implicate different parties, all of whom have agreed to arbitration with each other on a bilateral basis, if not necessarily in a group proceeding. Herein, “class action arbitration” and “class arbitration” will be used interchangeably to refer to consolidation of arbitral proceedings. FED. R. CIV. P. 23; *Stolt-Nielsen*, 130 S. Ct. at 1764-65.

<sup>6</sup> During the arbitration proceeding, counsel for AnimalFeeds argued that the claims against *Stolt-Nielsen* were “negative value” claims that would cost more to litigate than could be recovered in case of a victory. Transcript of Arbitration, at 82a-83a, *Stolt-Nielsen v. AnimalFeeds*. Rightly or wrongly, Justice Ginsburg in her dissent suggested that “only a lunatic or a fanatic sues for \$30.” See *Stolt-Nielsen*, 130 S. Ct. at 1783 (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). One can only speculate on the effect of this “negative value” on the settlement reached between *Stolt-Nielsen* and AnimalFeeds on 26 October 2010, when the District Court for the District of Connecticut approved AnimalFeeds’ voluntary dismissal of its claim. See generally, ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* (Foundation Press, 2003).

After a district court had ordered consolidation of the related actions,<sup>7</sup> the parties agreed to constitute a tribunal pursuant to the American Arbitration Association's Supplementary Rules on Class Arbitration ("AAA Supplementary Rules") to address whether the various arbitrations could and should be consolidated.<sup>8</sup> In a partial award, the arbitrators construed the arbitration clause to permit class arbitration, which might be ordered at a subsequent stage upon a finding of certain prerequisites, such as common questions of law and fact among the class members. That path must have seemed conducive to a more efficient process, with savings in time and cost from grouping related claims into a single case.

## II. CONSOLIDATION AND EXCESS OF AUTHORITY

### A. *The Majority Decision*

The asserted efficiencies in class arbitration, with savings from combined claims, did not impress the ship owners, who sought to vacate the award for excess of authority. Ultimately a majority of the U.S. Supreme Court held that the arbitrators had exceeded their authority by imposing personal policy views, rather than deciding pursuant to applicable law.<sup>9</sup> The Court based its conclusion on a

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<sup>7</sup> See *In re Parcel Tanker Shipping Services Antitrust Litigation*, 296 F. Supp. 2d 1370, 1370-71 (J.P.M.L. 2003).

<sup>8</sup> AnimalFeeds brought the claim on behalf of itself and all others similarly situated in a putative class action under FRCP Rule 23 against Stolt-Nielsen, Odfjell, Jo Tankers, and Tokyo Marine. *Id.* at 1371; FED. R. CIV. P. 23.

<sup>9</sup> The majority opinion of the Supreme Court was authored by Justice Alito, joined by Justices Scalia, Thomas, Kennedy, and Chief Justice Roberts. Justice Alito wrote:

It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must

somewhat unusual feature of the case, which was a post-dispute stipulation concluded by the parties confirming that their contracts were silent on the matter of class action arbitrations, in the sense that “no agreement” had been reached.

Significantly, the Court did not say that parties must agree explicitly to class arbitration, but simply that the case at bar implicated no agreement, whether express or implied.<sup>10</sup> The majority held only that the ship owners’ right not to be subject to consolidated proceedings trumped any efficiency benefits from class arbitration, including the avoidance of costs that might otherwise discourage pursuit of claims.

#### B. *The Political Context*

The decision divided the Court sharply along political lines. A vigorous dissent by the more liberal Court members argued that the arbitrators were simply doing what the parties had instructed them.<sup>11</sup> The dissent pointed out that in accepting the AAA Supplementary Rules, the litigants had agreed to empower arbitrators to decide whether the dispute should proceed on a class action basis.<sup>12</sup>

The political dimensions of the case resist simple analysis. American

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conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.

*Stolt-Nielsen*, 130 S. Ct. at 1767-1768.

<sup>10</sup> See *id.* at 1776 n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration”).

<sup>11</sup> Justice Ginsburg wrote the dissent, joined by Justices Breyer and Stevens. Justice Sotomayor took no part in the Supreme Court’s decision, having been on the Second Circuit when the case was on appeal. *Id.* at 1766-67. However, Justice Sotomayor did agree with Justices Stevens, Ginsburg, and Breyer later that term, joining a dissent in *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2781-88 (2010), another case addressing arbitral jurisdiction.

<sup>12</sup> *Stolt-Nielsen*, 130 S. Ct. at 1777. Rule 3 of these AAA Supplementary Rules grants the arbitrators jurisdiction to determine whether the arbitration might, as a matter of contract, proceed on behalf of a class, assuming satisfaction of the relevant criteria for class certification set forth in Rule 4, which parallel factors in the Federal Rules of Civil Procedure. See AMERICAN ARBITRATION ASSOCIATION, AAA’s Supplementary Rules for Class Arbitration Rules 3 & 4, available at <http://www.adr.org/sp.asp?id=21936> (last visited March 20, 2011); FED. R. CIV. P. 23.

conservatives tend to favor arbitration as a process in line with freedom of contract. Yet their preferences get reversed for class proceedings, which appear as an anti-business tool of plaintiffs' lawyers fomenting litigation on a contingency fee basis.

In contrast, liberal justices often express skepticism of arbitration, seen as a device to sidestep the perceived safeguards of a civil jury.<sup>13</sup> Those same justices, however, seem to perceive class proceedings as a pro-consumer mechanism permitting multiple litigants to engage a legal team on an economical basis, permitting pursuit of the claims as a practical matter.<sup>14</sup>

### III. THE RIGHT ANSWER TO THE WRONG QUESTION

#### A. *The Second Agreement*

In its zeal to send a signal on the admittedly problematic nature of class action arbitration, the majority conflated two distinct matters. The first relates to monitoring arbitral jurisdiction, which falls to courts. The second concerns substantive merits of the parties' dispute, which falls to arbitrators.<sup>15</sup>

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<sup>13</sup> Liberal doubts about arbitration are not new. *See e.g.*, the dissent by Justice Stevens in the landmark *Mitsubishi* case allowing arbitration of anti-trust claims in an international context. Stevens wrote, "Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 666 (1985).

<sup>14</sup> The vogue for protecting consumers from arbitration in the United States can be seen in the Dodd-Frank Act (2010) which invalidates (or in some cases permits invalidation of) pre-dispute arbitration agreements in cases with deemed imbalances in bargaining power. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223. If enacted, the pending Arbitration Fairness Act would yield similar results on a broader scale. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). *See also* Department of Defense Regulation Restricting the Use of Mandatory Arbitration Agreements, 48 C.F.R. §§ 212, 222 & 252 (2010).

<sup>15</sup> *See generally*, William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, in 13 ICCA CONGRESS SERIES 55 (Albert Jan Van Den Berg ed., 2007).

The opinion by Justice Alito rightly noted the parties' post-dispute stipulation that the contract was silent in the sense of containing "no agreement" on class action arbitration. However, the litigants had unequivocally asked arbitrators, not judges to construe their *ex ante* intent on class arbitration.<sup>16</sup> Article 3 of the AAA Supplementary Rules, titled "Construction of the Arbitration Clause," provides the arbitrators with an explicit grant of jurisdiction as follows:

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award").<sup>17</sup>

The arbitrators were thus empowered by the parties to address whether the arbitration clause permitted the case to proceed on behalf of a class.<sup>18</sup> The litigants moved that question to the realm of the dispute's substance, which under the FAA normally remains within the purview of the arbitrators.

In essence, the majority gave the right answer to the wrong question. The relevant inquiry facing the Court was not, "What did the parties agree in general?" but the more limited issue, "What did the parties agree to arbitrate?" By accepting the AAA Supplementary Rules, the parties gave to the arbitrators the question of whether the contract allowed class action arbitration, thus generally precluding

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<sup>16</sup> Brief in Opposition at 2, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 (2010).

<sup>17</sup> AMERICAN ARBITRATION ASSOCIATION, *supra* note 12. Moreover, Rule 3 recognizes that such a determination will be considered an award subject to review pursuant to the delineated grounds for vacatur, but no more, as provided in the FAA. The Rule continues, "The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award." The point of Rule 3 is to construe the contract, as a threshold matter, to determine whether the parties agreed to submit their dispute to class arbitration at all.

<sup>18</sup> The applicability of these AAA procedures was explicitly recognized by the majority. *Stolt-Nielsen*, 130 S. Ct. at 1765.

judicial second-guessing on that matter. Courts might still intervene to monitor bias or lack of due process, but not to correct a simple mistake in the arbitrators' contract interpretation.

Thus the chief mischief of *Stolt-Nielsen* lies in its potential to decrease the finality of commercial arbitration, defeating the parties' aim that their dispute be decided by arbitrators rather than courts. Few would disagree that arbitrators must remain faithful to the parties' contract, not create new public policy.<sup>19</sup> Unfortunately, the majority opinion took that general proposition as an avenue to justify award annulment simply because the arbitrators got it wrong on a question submitted for their determination.

*B. Substantive Merits vs. Arbitral Authority*

In holding that the award should be vacated, the majority invoked excess of authority by the arbitral tribunal, one of the limited statutory grounds for vacatur under the FAA.<sup>20</sup> Under the facts of the case, however, the Court may well have blurred the distinction between excess of jurisdiction and simple mistake of law, dressing the latter in the garb of the former.

True enough, articulating a robust definition of excess of authority has often proved tenuous.<sup>21</sup> On the basis that litigants do not expressly empower

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<sup>19</sup> The *Stolt-Nielsen* majority opinion at 1767-68 declared that the award must be vacated because the tribunal simply "impose[d] its own view of sound policy regarding class arbitration."

<sup>20</sup> The exclusivity of the FAA as the source for vacatur grounds was declared by the U.S. Supreme Court in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>21</sup> Attempts to define jurisdiction sometimes bring to mind the line by U.S. Supreme Court Justice Potter Stewart, admitting an inability to define "hard core" obscenity but adding, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), examining when erotic expression falls outside the limits of Constitutionally protected speech in the context of a Louis Malle film *Les Amants* about a woman in an unhappy marriage. British judges sometimes apply a less risqué characterization test. In deciding that a floating crane was not a "ship or vessel" for purposes of insurance policy, Lord Justice Scrutton referred to the gentleman who "could not define an elephant but knew what it was when he saw one." *Merchants Marine Insurance Co. Ltd. v. North of*



arbitrators to make mistakes, at least one judge has gone so far as to suggest that errors always constitute an excess of authority.<sup>22</sup>

Such a stretch, however, ignores that the parties asked an arbitrator, not a judge, to decide the case, thus assuming the risk that the arbitrator might get it wrong. Nothing in the FAA permits judges to impose their own views on matters submitted to arbitration. The integrity of the arbitral process requires not only that judges scrutinize gateway questions related to the contours of the litigants' agreement to arbitrate, but equally that courts respect the arbitrators' decisions on issues given to them for adjudication.

In this context, one may recall words used from an earlier U.S. Supreme Court decision addressing a dispute between a New York merchant and an Illinois store owner before arbitrators who ultimately awarded damages to the ill-treated storekeeper. Having lost in arbitration, the unhappy New Yorker succeeded in having the award set aside by a lower court. The Supreme Court reversed with the following reasoning:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators],

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England Protecting & Indemnity Association, [1926] 26 Lloyd's Rep. 201, at 203, 32 Com. Cases 165, at 172, 43 T.L.R. 107 (Court of Appeal).

<sup>22</sup> The great English jurist Lord Denning once suggested (albeit in an administrative context) that "Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void." See LORD DENNING, *THE DISCIPLINE OF THE LAW* 74 (1979). See also *Pearlman v. Keepers and Governors of Harrow School*, [1978] 3 W.L.R. 736, 743 (A.C.) ("The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded."). Happily for the health of English law, the House of Lords in 2005 rejected this position a year ago in the *Lesotho Highlands Development Authority v. Impreglio SpA* [2005] UKHL 43.

and would make an award the commencement, not the end,  
of litigation.<sup>23</sup>

To extend jurisdictional analysis further than allowed pursuant to the FAA would permit any unhappy loser in a fair proceeding to renege on the bargain to arbitrate simply when a decision proves not to their liking.

There is nothing odd in saying that parties express their intent to arbitrate matters which might otherwise be jurisdictional in nature. For example, allegations that the signature in an arbitration clause had been forged would normally give rise to a judicial review. Yet it would always be up to the parties to agree that the allegation of forgery should be arbitrated,<sup>24</sup> in which case the arbitrator would be the one to determine the genuineness of the signature.<sup>25</sup>

At some point, of course, arbitrators might simply invent a legal standard informed only by their personal policy preferences.<sup>26</sup> In such an instance, they

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<sup>23</sup> *Burchell v. Marsh*, 58 U.S. 344, 349 (1855).

<sup>24</sup> With respect to the very existence of an agreement to arbitrate (such as raised by the allegations of forgery), a separate post-dispute agreement to arbitrate would normally be needed to confer arbitral jurisdiction. By contrast, with respect to procedural matters (such as respect for time limits) the parties might well confer arbitral authority in a single contract containing a clear mandate for arbitrate. *See Howsam v. Dean Witter*, 537 U.S. 79 (2002) (addressing the right to interpret a requirement that arbitration be filed within six years after “the occurrence or event giving rise to the dispute”).

<sup>25</sup> Such delegation of jurisdictional authority in a separate agreement is exactly what happened in *Astro Valiente Compania Naviera v. Pakistan Ministry of Food & Agriculture* (The Emmanuel Colocotronis No. 2), [1982], 1 All E. R. 823, [1982] 1 Lloyd’s Rep. 286 (QB, Commercial Court) where buyers of wheat refused to arbitrate a dispute with the shipper on the theory that the arbitration clause in the charter party had not been incorporated in the bill of lading. The parties submitted to ad hoc arbitration the question of whether the arbitration clause was incorporated into the bill of lading, and were subsequently held to be bound by an award finding that the buyers had agreed to arbitrate based on language in the bill of lading providing “All other conditions ... as per ... charter party.”

<sup>26</sup> The sting in the majority’s vacatur of the award lies in the line, “what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767-68. However, a thoughtful observer might give serious consideration to the accuracy of the majority’s view. Justice Ginsberg in her dissent notes that the tribunal did in fact tie its conclusion “to New York law, federal maritime law, and decisions made by other panels pursuant to Rule

would be exceeding their authority. The facts of *Stolt-Nielsen*, however, do not lend themselves to painting the arbitrators as such wild cards.<sup>27</sup>

It may well be that the majority's aversion to forced joinder represents sound policy.<sup>28</sup> However, it was for the parties to adopt whatever path they preferred for contract interpretation on this matter. Under the facts in *Stolt-Nielsen*, the two sides asked arbitrators, not courts, to construe their agreement with respect to class arbitration. The "no agreement" stipulation must be read in conjunction with the post-dispute adoption of the AAA Supplementary Rules.

Although stressing that the award was not yet "ripe" for review, the opinion by Justice Ginsburg acknowledged the effect of the agreement to apply the AAA Supplementary Rules. Her dissent notes:

The parties' supplemental agreement, referring the class-

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3 [of the AAA Supplementary Rules]." *Id.* at 1780 (citing *Evans v. Famous Music Corp.*, 807 N. E. 2d 869 (N.Y. 2004)).

<sup>27</sup> In *Stolt-Nielsen*, the arbitrators' understanding of the law was made on the basis of an earlier U.S. Supreme Court decision in which a mere plurality of the Court held that determinations on consolidation were for the arbitrators themselves. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). The legacy of this case was anything but clear. None of the four opinions in *Bazzle* commanded a majority. The plurality felt that the arbitrator should decide whether the parties' agreement allowed for class action arbitration. Justice Stevens concurred with the outcome but did not endorse its reasoning. The dissent by Chief Justice Rehnquist argued that the parties' contract demonstrated no consent to class action arbitration. The dissent by Justice Thomas noted that the case originated before South Carolina state courts, and contended that the FAA did not apply to state proceedings. In the context of the point made by Justice Thomas, it is interesting that *Stolt-Nielsen* implicated a maritime matter, falling within the purview of federal rather than state law.

<sup>28</sup> In some instances non-signatories may be brought into proceedings on the basis of findings of agency, or facts which justify piercing the corporate veil. *See generally*, William W. Park, *Non-Signatories and International Contract*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 3 (Permanent Court of Arbitration, ed., 2009). *See Dallah Real Estate and Tourism Holding Co. v. Gov't of Pakistan*, [2010] UKSC 46 for a recent British decision on the matter. Although the British Supreme Court held that there was no justification to join the government of Pakistan, an analogous decision by the Paris *Cour d'appel* came to the opposite conclusion, dismissing a challenge to an award against the state. *See Cour d'appel de Paris*, Feb. 17, 2011. The U.S. Supreme Court, of course, is well aware of the various theories on which non-signatories might be joined in arbitration. *See Arthur Andersen v. Carlisle*, 129 S. Ct. 1896 (2009) (addressing notions of third party beneficiaries).

arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.<sup>29</sup>

Put differently, the job of construing the contract's scope on the matter of consolidation had been expressly conferred on arbitrators, not judges.

The calculus for judicial intervention changes, however, if no subsequent agreement exists to refer the matter to construction pursuant to the AAA Supplementary Rules. Under the factual matrix of *Stolt-Nielsen*, everyone had in fact signed arbitration agreements. In such circumstances, the dangers, milder in magnitude when speaking in relative terms, were simply that arbitrators might erroneously presume an intent to permit collective (rather than bilateral) proceedings among entities that had already consented to renouncing their recourse to courts. The greater disruption lurks in the possible extension of class proceedings to include persons who never signed arbitration agreements at all, most likely the next step for those who press to import true American-style class proceedings into arbitration.<sup>30</sup>

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<sup>29</sup> *Stolt-Nielsen*, 130 S. Ct. at 1780.

<sup>30</sup> Statutory court-ordered consolidation of arbitral proceedings is a different matter, given that all parties would presumably be subject to the relevant judicial jurisdiction. *See, e.g.*, MASS. GEN. LAWS ch. 251, § 2A (2010), allowing consolidation as provided in the Massachusetts Rules of Civil Procedure, which in Rule 42 permits joinder of actions “involving a common question of law or fact.” MASS. R. CIV. P. 42 (2008). The provision was applied in *New England Energy v. Keystone Shipping*, 855 F.2d 1, 3 (1st Cir. 1988), which held that a federal district court could grant consolidation pursuant to Massachusetts state law where the parties’ agreement was silent on such matter. *See also* MASS. GEN. LAWS ch. 90 § 7N1/2 (1998), requiring non-voluntary arbitration of claims over allegedly defective vehicles. *Compare* CAL. CIV. PROC. CODE § 1281.3 (West 1978) (permitting consolidation of arbitration proceedings that involve a “common issue or issues of law or fact” but requiring that “separate arbitration agreements or proceedings exist between the same parties; or that one party is a party to a separate arbitration agreement or proceeding with a third party”), *with* *Government of the United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993) (limiting a court’s discretion to grant consolidation of

C. *Opt-in For Class Members*

The AAA Supplementary Rules provide criteria for class certification, setting forth factors that largely parallel those in the Federal Rules of Civil Procedure. If arbitrators have found that the contract permits class action arbitration, they will proceed to determine whether the various proceedings should go forward on a class basis. Pursuant to prerequisites in Article 4 of those Supplementary Rules, one or more claimants may represent a class only if each of the following conditions is met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

A careful observer will note that the final prerequisite, Rule 4(6), speaks of each class member having entered into an agreement containing an arbitration clause substantially similar to the one signed by the class representative. On its face, such

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arbitration proceedings arising from separate agreements “absent the parties’ agreement to allow such consolidation”).

language seems to leave open the prospect that a company which never had an arbitration clause with the ship owners might become part of the arbitration through a unilateral post-dispute “opt-in” process. Lacking reciprocity, such a mechanism seems to derogate from the abecedarian principle that arbitration (unlike court proceedings) presupposes consent.

Under the facts of *Stolt-Nielsen*, all owners and all customers had agreed to arbitrate with each other through clauses in the charter-parties.<sup>31</sup> Consolidation simply moved things from bilateral to multilateral proceedings, without deeming into life an agreement to arbitrate where none had existed.

The calculus for class arbitration, however, would change dramatically if a unilateral “opt-in” process were to bring into the arbitration potential claimants with which respondents had never concluded any arbitration agreement at all. Like marriage, commercial arbitration implicates mutual consent, not an open-ended option to be exercised by a host of partners.<sup>32</sup>

#### IV. LOOKING FORWARD

Speculation about the effect of *Stolt-Nielsen* remains a daunting task. If arbitration scholars could predict the future they would likely be in another business.<sup>33</sup>

Although the peculiar facts of *Stolt-Nielsen* limit its precedential value,<sup>34</sup> the reasoning is sure to be pressed into service to justify award annulment in cases

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<sup>31</sup> *Stolt-Nielsen*, 130 S. Ct. at 1765.

<sup>32</sup> A different analysis applies to proceedings based on bilateral investment treaties and free trade agreements, where host states provide standing offers to arbitrate with potential investors.

<sup>33</sup> One recalls the whimsical comment attributed to French Resistance leader, Pierre Dac, that prediction remains difficult particularly when it concerns the future: “La prévision est difficile surtout lorsqu’elle concerne l’avenir.” For a more systematic treatment of the unforeseeable nature of history. See NASSIM NICHOLAS TALEB, *THE BLACK SWAN* (2007).

<sup>34</sup> The decision rests on an explicit “no agreement” stipulation not likely to be repeated if the parties resisting class arbitration have competent counsel. See S. I. Strong, *Opening*

where judges differ with arbitrators on the substantive outcome of a case. Indeed, by ignoring the litigants' agreement to arbitrate whether class proceedings were authorized, the decision raises the prospect that arbitration will become mere foreplay to litigation.

To make matters worse, the majority provides little if any guidance on factors that might demonstrate the parties' intent to permit class arbitration. In a key footnote, the majority punts to future decisions the important question of how to define the contours of an agreement to class action proceedings, stating "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."<sup>35</sup>

Apart from sowing confusion on the allocation of tasks between judges and arbitrators, the case leaves a legacy of other open questions. The Court fails to address the much vexed matter of whether "manifest disregard of the law" continues to exist as an independent ground for review of arbitral awards.<sup>36</sup> Instead, the decision says only that if such a standard exists, it was satisfied under the facts of the *Stolt-Nielsen*,<sup>37</sup> thus leaving the vitality of the doctrine open to question.<sup>38</sup>

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*More Doors than it Closes*, 2010 LLOYD'S MAR. & CONSUMER L.Q. 565 (Nov. 2010) for a scholarly perspective on the effect of *Stolt-Nielsen* in future cases.

<sup>35</sup> See *Stolt-Nielsen* 130 S. Ct. at 1782, n.10.

<sup>36</sup> First introduced in dictum of the 1953 U. S. Supreme Court decision *Wilko v. Swann*, "manifest disregard of the law" has raised considerable concern in some quarters. See, e.g., the opinion by Chief Judge Posner in *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7 Cir. 1994), which refers to the doctrine as having been "[c]reated *ex nihilo* [as] a nonstatutory ground for setting aside arbitral awards." Judge Posner, continued: "If [manifest disregard] is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles-whether the arbitrators 'exceeded their powers'-it is superfluous and confusing."

<sup>37</sup> See *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3: "We do not decide whether 'manifest disregard' survives ... as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." The Court then continued, "Assuming, arguendo, that such a standard applies, we find it satisfied for the reasons that follow [in the majority opinion]."

<sup>38</sup> Whether "manifest disregard of the law" exists as an independent ground for judicial review of awards was put into doubt by the 2008 Supreme Court decision in *Hall Street*

The majority opinion will likely provoke further politicization of arbitration in the United States.<sup>39</sup> The drama springs from two idiosyncrasies of American legal culture. The first lies in the absence of any general nation-wide statute to insulate consumers and employees from abusive arbitration arrangements.<sup>40</sup> The second rests in the availability of civil juries to decide ordinary contract cases. Arbitration thus commends itself to those with doubts about the reliability of such juries, often perceived as rendering unreasonable verdicts tainted with bias against manufacturers and employers.

One of the next battlegrounds will implicate contractual waivers of class action arbitration.<sup>41</sup> In one federal appellate case, the court invalidated a waiver of class action arbitration even after an earlier decision was remanded by the Supreme Court for reconsideration in light of *Stolt-Nielsen*.<sup>42</sup> The court maintained its view that the waiver was invalid because it raised the cost of arbitration so as to preclude plaintiffs from enforcing competition law.

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*Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). More recently, the Supreme Court passed up another opportunity to consider “manifest disregard” in *Certain Underwriters at Lloyd’s, London v. Lagstein*, 607 F.3d 634 (9th Cir. 2010), *petition for cert. denied*, 131 S. Ct. 832 (2010).

<sup>39</sup> For the current state of controversy over the costs and benefits of arbitration in the United States, readers are directed to the history of the Arbitration Fairness Act of 2009, H.R. 1020 & S. 931 (111th Congress, 1st Session). Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). and/or S. 931, 111th Cong. (2009).

<sup>40</sup> See e.g., debate on Arbitration and Fairness Act of 2009, H.R. 1020 & S. 931 (111<sup>th</sup> Congress, 1<sup>st</sup> Session). The U.S. Congress, however, can and has passed legislation limiting arbitration on behalf of special interest groups. See Motor Vehicle Franchise Contract Act of 2002, § 11028, Pub. L. No. 107-273, 116 Stat. 1758, 1835-36 (codified at 15 U.S.C. § 1226 (2000)), sometimes known as the Bono Bill in recognition of its original sponsor, the late Sonny Bono. Recently, Senators Jeff Sessions and Russell Feingold proposed a bill intended to provide broad protection of consumer interests, albeit perhaps of an over-inclusive nature that sacrifices vital elements of party autonomy and efficient dispute resolution. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223.

<sup>41</sup> The effectiveness of waivers drafted to preclude recourse to class action arbitration is currently before the U.S. Supreme Court in its review of a decision by the Federal Court of Appeals for the Ninth Circuit in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 45 (2010). Oral arguments heard on Nov. 9, 2010 explored whether the FAA preempts reliance on state law related to unconscionability principles that might be invoked to strike down such waivers.

<sup>42</sup> See *In Re Am. Express Merchants Litigation*, 2011 WL 781698 (2d Cir. 2011).



Such an approach leaves respondents in a difficult position. If a contract contains a class action waiver, a judge would be unable to compel class proceedings due to the decision in *Stolt-Nielsen* which requires agreement on the matter. Yet the same judge might feel unable to grant a motion for non-class arbitration, considering bilateral proceedings to be unconscionable because the cost effectively denies claimant an ability to enforce statutory rights. Practitioners will in any event focus more on drafting arbitration clauses,<sup>43</sup> whether within the framework of consumer and employment contracts or business-to-business transactions.<sup>44</sup>

Finally, *Stolt-Nielsen* raises the question whether judges outside the United States will stay court actions in conflict with class arbitration, particularly if arbitrators allow unilateral “opt-in” by persons who had not previously agreed to arbitrate.<sup>45</sup> In the context of litigation in France or England, for example, it is far from evident that a court would refuse to hear a claim merely because the respondent, benefiting from no pre-existing arbitration agreement, had simply opted into American class arbitration.

Whatever lessons might or might not be apparent from *Stolt-Nielsen*, the case highlights tensions inherent in determining arbitral jurisdiction, as well as political friction in connection with the role of arbitration in enhancing economic

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<sup>43</sup> See Paul Friedland & Michael Ottolenghi, *Drafting Class Action Clauses After Stolt-Nielsen*, 65 DISP. RES. J. 22 (May-Oct. 2010), who suggest explicitly addressing the question of class action arbitration in the arbitration clause to avoid any confusion resulting from how future courts will interpret *Stolt-Nielsen*.

<sup>44</sup> Justice Ginsburg’s dissent noted that the parties in *Stolt-Nielsen* were sophisticated businesses with sufficient resources and experience to bargain, rather than parties subject to contracts of adhesion. Whether this argument cuts in favor or against a presumption to allow class action arbitration remains an open question. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1783.

<sup>45</sup> See discussion *supra* of Rule 4(6) of the AAA Supplementary Class Arbitration, which makes references to agreements by “each class member,” (i.e., the claimant) to enter the arbitration, irrespective of any prior agreement to arbitrate with the respondent.

cooperation. In large measure, resolution of these strains will depend on honest and mature debate rather than ideology or dogma.<sup>46</sup>

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<sup>46</sup> See generally, William W. Park, *Les devoirs de l'arbitre: ni un pour tous, ni tous pour un*, 2011 CAHIERS DE L'ARBITRAGE 13 (2011).